MALAYSIA SHIPYARD & ENGINEERING SDN. BHD.

v.

BANK KERJASAMA RAKYAT (M) BHD.

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
ABDUL HAMID OMAR CJ (MALAYA)
WAN SULEIMAN SCJ
GEORGE SEAH SCJ
EUSOFFE ABDOOLCADER SCJ
[CIVIL APPEAL NO. 209 OF 1984]
30 MARCH 1985

UNINCORPORATED ASSOCIATIONS: *Powers of registered societies - Guarantee to non-members - Meaning of "transaction" - Section 8 and s. 32 of Co-operative Societies Act 1948 (the Act).*

CONTRACT: *Guarantee - Whether enforceable as being intra vires powers of a co-operative society - Ultra vires - Section 14(1)(a) of Bank Kerjasama Rakyat Malaysia Berhad (Special Provisions) Act 1978.*

The respondents are a co-operative society registered under the Co-operative Societies Act. Under the said guarantee the respondents agreed to indemnify the appellants up to a sum of RM500,000 in the event of a certain company, Syarikat Pembinaan Azlin Sdn. Bhd., failing to perform its contract with the appellants. The company failed to perform the contract and the appellants terminated the said contract and sued the respondents under the guarantee. Razak J in the High Court held that the guarantee was invalid as the respondents' by-laws did not permit them to give a guarantee in favour of a non-member (which the company and appellants were). The appellants appealed against the decision and argued that s. 32 read with s. 8 of the Act empowers the respondents to give such a guarantee.

Held:

[1] (by the Court). The by-laws of the respondents should not be the basis of determining the validity or otherwise of the guarantee as it is merely a rule of conduct which governs the internal government of the respondents. Since the guarantee concerned a relationship between the respondents and a non-member, the guarantee should be governed by the statute under which it was incorporated.

[2] (by majority, Wan Suleiman SCJ, George Seah SCJ dissenting). The word "transaction" in s. 32 does not cover a guarantee. There is no express provision in either the Act or the Rules enabling the respondents to issue the guarantee. Whatever a statutory corporation does by way of contract, it can only do so within its objects for which it is incorporated otherwise it will be *ultra vires.*

per Salleh Abas LP:

> With respect, I cannot accept this submission as being correct. In the first place the giving of a guarantee to a non-member for the benefit of another non-member is not an ordinary type of business or a usual and customary function of a co-

operative society. In terms of importance, the giving of a guarantee ranks in the same order as does the giving of loans and borrowing. By expressly mentioning the power to give loans and to receive them, especially in very restrictive terms, surely the legislature cannot be taken to have intended to authorize a co-operative society to give guarantees to non-members. If the legislature has so intended one would expect it to have spelt out that power in an express and clear provision to that effect in the same way as it has done in the case of power of giving loans and borrowing.

[3] (by Wan Suleiman SCJ and George Seah SCJ dissenting):

(a) The legislature in s. 32 of the Act clearly gave the society a wide discretion which has not, in respect of a guarantee, been cut down or restricted by the rules. The object of the society in s. 4(1) should not be resorted to as an aid to the construction of s. 32. "Transaction" must by necessity relate to all dealings expressly or impliedly authorised by s. 8. Since the respondents are expressly empowered by s. 8 to enter into a contract and since guarantee is a form of contract under s. 79 of the Contracts Act, 1950, "transactions" as used in s. 32 should be construed to include a guarantee. The guarantee given is therefore *intra vires*, lawful and valid.

(b) Section 14(1) (a) of the Bank Kerjasama Rakyat Malaysia Berhad (Special Provisions) Act 1978 (the 1978 Act) gives the respondents the power, among others, to stand guarantee for any loan to any person and is further support of the view that s. 32 of the Act gives the respondents the power to stand guarantee. The later 1978 Act also removes possible doubts as to the interpretation of s. 32 of the earlier Act.

per Abdoolcader SCJ (in the majority) on s. 14(1) (a) of the 1978 Act: "s. 14(1) (a) of the 1978 Act is not applicable as s. 3(b) of the 1978 Act says that those provisions are applicable only on the commencement of the Act, which was in 1978. The guarantee was given in 1975. Furthermore, the specific provisions of s. 14(1) (a) of the 1978 Act in relation to power to stand guarantee clearly manifests the fact that there was no such power hitherto under s. 8 and s. 32 of the earlier Act as otherwise it would have been quite unnecessary to enact a specific enabling provision for this purpose."

[Appeal dismissed with costs]

Cases referred to:

PP v. Datuk Haji Harun bin Haji Idris [1977] 1 MLJ 180
Colman v. The Eastern Counties Rly Company [1846] 50 ER 481
Small v. Smith [1884-85] 10 AC 119
Shrews and Birmingham Rly Co. v. N.W. Rly Company [1857] 10 ER 1237
Birkdale District Electric Supply Co. Ltd. v. Southport Corporation [1926] AC 355
Ashbury Railway Carriage and Iron Co. v. Riche [1875] LR 7 HL 653
Warburton v. Loveland [1832] 2 D & CL 480
In re Macmanaway and In re The House of Commons (Clergy Disqualification) Act 1801 [1951] AC 161
Mersey Docks v. Henderson [1888] 13 App Cas 595
Crawford v. Spooner [1846] 6 Moore PC 1
Magor and St. Mellons R.D.C v. Newport Corporation [1952] AC 189

London Transport Executive v. Betts [1959] AC 213
Gwynne v. Burnell [1840] ER HL 1188
Whiteley v. Chappell [1868] LR 4 QB 147
Sagarmull Nathany v. John Galstaun [1930] AIR PC 205
McLaughlin v. Westgarth [1906] 75 LJPC 117
Re Samuel [1973] AC 514
Baroness Wenlock v. River Dee Company [1887] 36 Ch D 675n
Attorney-General v. Great Eastern Railway Company [1880] 5 App Cas 473

Legislation referred to:
Bank Kerjasama Rakyat Malaysia Berhad (Special Provisions) Act 1978, s. 14(1)(a)
Contracts Act 1950, s. 79
Co-operative Societies Act 1948, ss. 7, 8, 30, 31, 32, 51
Interpretation and General Clauses Ordinance 1948, s. 30(1)

Other sources referred to:
Halbury's Laws of England, 4th Edn., Vol. 9, p. 779, para. 1333, 1334
Anson's Law of Contract, 25th Edn., p. 229
Shorter Oxford English Dictionary
Words and Phrases Legally Defined

For the appellants - J.J. Puthucheary (Rasa Ratnam with him); M/s Skrine & Co.
For the respondents - S. Achan (Dennis Xavier and Tengku Mohamed Fauzi with him); M/s Nik Hussain, Ibrahim & Abdullah

JUDGMENT

Salleh Abas LP:

The issue in this appeal is whether a guarantee given by the respondents on 14 October 1975 to the appellants is valid. The respondents are a co-operative society registered under the Co-operative Societies Act 1948 - Revised 1983 as Act 287 - (the Act). By the said guarantee the respondents agreed to indemnify the appellants up to a sum of RM500,000 in the event of a certain company called Syarikat Pembinaan Azlin Sdn. Bhd. (Azlin) failing to perform its contract with the appellants. This contract was signed on 29 September 1975, i.e., about a fortnight before the guarantee.

Azlin failed to perform the contract, whereupon the appellants terminated the said contract and thereafter sued the respondents upon the guarantee. Razak J in the Court below held that the guarantee was not valid because the respondents' by-laws does not permit them to give any guarantee in favour of a non-member. Both the appellants and Azlin were not members of the respondents.

It is true that the by-law of the respondents does not allow the giving of this guarantee, but the by-law should not be the basis of determining the validity or otherwise of this guarantee since it is merely a rule of conduct which governs the internal government of the respondents. The guarantee in this case concerns a relationship between the respondents and non-members, and as such should be governed by the statute under which the respondents were incorporated. The question is, therefore, this: Are the respondents empowered by the Act and or the Rules made under the Act to give such guarantee? If they are, the guarantee is valid, and if they are not, the guarantee is not valid.

Unlike a natural person whose position in law is that he or she can do anything unless prohibited or restricted by law, a co-operative society (of which the appellants being registered under s. 7 of the Act are one) being a statutory corporation is not allowed to do anything unless authorized by the statute under which it is incorporated. In other words, the principle of law regarding powers applicable to a co-operative is the very reverse of that which is applicable to a natural person. The principle is succinctly stated in *9 Halsbury's Laws of England,* 4th Edn., para. 1333, at p. 779, as follows;

> 1333. **Statutory corporation**. The powers of a corporation created by statute are limited and circumscribed by the statutes which regulate it, and extend no further than is expressly stated therein, or is necessarily and properly required for carrying into effect the purposes of its incorporation, or may be fairly regarded as incidental to, or consequential upon, those things which the legislature has authorized. What the statute does not expressly or impliedly authorize is to be taken to be prohibited.

The same principle was enunciated by Abdoolcader J (as he then was) in *PP v. Datuk Haji Harun bin Haji Idris* [1977] 1 MLJ 180 at 205. It is, therefore, clear that the powers of a statutory corporation like the respondents are (i) those expressly provided in the statute, and (ii) those which may reasonably be implied as necessary and proper for the purpose of carrying out the object of its incorporation, and the limit of its implied power is the object of its incorporation.

There are three provisions of the Act which should be considered in connection with this guarantee. These are ss. 30, 31 and 32, which for the sake of easy reference are set out as follows:

> 30. (1) A registered society may make loans:
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> (a) to its members;
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> (b) to its employees;
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> (c) to its subsidiaries, or
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> (d) to another registered society which had obtained the approval of the Registrar-General as prescribed by the rules;
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> (2) (deleted by Act A334).
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> (3) The Minister may, by general or special order, prohibit or restrict the lending of money on a mortgage or charge of any description of immovable property by any registered society, or class of registered societies;
>
> 31. A registered society shall receive deposits and loans from persons who are not members only to such extent and under such conditions as may be prescribed by the rules or by-laws.
>
> 32. Save as provided in s. 30 and 31 the transactions of a registered society with persons other than members shall be subject to such prohibitions and restrictions as may be prescribed by the rules.

Section 30 clearly empowers the respondents to give loans and even so the power is restricted to the giving of loans to certain classes of borrowers only, namely only to those connected with the respondents. s. 31, on the other hand, empowers the respondents to borrow from non-members in the form of receiving deposits and loans

from them, and here again the borrowing power is limited to the extent and conditions prescribed by the rules and by-laws. The giving of a guarantee is neither giving nor receiving loan. It is a distinct and separate kind of dealing altogether. Although a guarantee purports to create liability on the surety, in no sense could it be said that the surety is borrowing the guaranteed sum from the creditor (the person to whom the guarantee is given) or giving a loan of that amount to the principle debtor (the person for whose advantage the guarantee is given). (See *In Re Queen Anne and Garden Mansions Co.* (1894) Vol. 1, *Mansion's Report of Cases in Bankruptcy and Companies Winding-up*, p. 460). Thus, since a guarantee is neither a loan nor a borrowing, both ss. 30 and 31 do not apply to the giving of a guarantee by the respondents.

Counsel for the appellants submitted that the respondents' power to give the guarantee in this case is fully covered by s 32. According to his submission the word "transaction" used in the section is wide enough to include the giving of guarantee, and there being no restrictions or prohibitions in the rules against the giving of it, the guarantee in this case should therefore be valid.

With respect, I cannot accept this submission as being correct. In the first place the giving of a guarantee to a non-member for the benefit of another non-member is not an ordinary type of business or a usual and customary function of a co-operative society. In terms of importance, the giving of a guarantee ranks in the same order as does the giving of loans and borrowing. By expressly mentioning the power to give loans and to receive them, especially in very restrictive terms, surely the legislature cannot be taken to have intended to authorize a co-operative society to give guarantees to non-members. If the legislature has so intended one would expect it to have spelt out that power in an express and clear provision to that effect in the same way as it has done in the case of power of giving loans and borrowing. Such an important provision cannot, in my view, be inferred from the word "transaction" used in the section. This word should only relate to such power as a co-operative society reasonably and properly requires for the purpose of carrying out objects of its incorporation, such as the power to employ officers and servants, to have an office, to equip it and the like. (*Colman v. The Eastern Counties Rly. Company* [1846] 50 ER 481 at 486, and *Small v. Smith* [1884-85] 10 AC 119 at 138). Section 32 cannot, in my view, be interpreted to mean that a co-operative society can enter into all kinds of transactions so long as they are not restricted or prohibited by the rules.

Since *Small v. Smith* (*supra*) was relied by both sides, it is necessary to say something about the case. In my judgment nothing that was decided or said in that case affects the opinion I express in the present appeal. If at all it strengthens it. In that case the question before the House of Lords was whether a corroboration bond issued by a building society incorporated under the U.K. Building Societies Act of 1874 guaranteeing the payment of a prior debt of a member to whom the Society gave a loan was authorized by the Act or the rules. What happened in that case is this: This society gave a loan to one Mr. MacDonald, a member of the society for £1,000 and as security took a second mortgage of Mr. MacDonald's property which was then subject to a prior mortgage to secure his earlier loan of £3,000 taken from an earlier creditor. When the earlier creditor wanted to sell the property in order to recover the £3,000 debt, with a view to protecting its interest as regard its loan of £1,000 to Mr. MacDonald, the Society issued a bond

(called bond of corroboration) guaranteeing the payment of Mr. MacDonald's £3,000 debt to the earlier creditor. The liquidator who was subsequently appointed for the Society which then being wound-up rejected the bond and applied to Court to have it set aside.

The Lord Chancellor (Earl of Selborne) and two other Law Lords unanimously held that such a transaction which was in effect in financial commitment of the Society's fund for the liability of another was not authorized by the Act nor by the rules. He concluded that the giving of such bond was not authorized by either its main purpose or by its incidental purpose. The directors who managed the Society were neither authorized by the Act nor by the rules to enter into the transaction of this sort. The rules of the Society were absolutely silent as to the issue of such bond. Dealing with this aspect of the matter, Lord Blackburn observed as follows:

> There certainly is no express power given to them (directors) to do so, (to issue the bond) and I can find no reason why they should be able to do it. So far from its being an ordinary and regular part of the course of the business, I think, so far as one can make out from reading the rules expressing what the parties who drew these rules thought was the course of business, there is no indication whatever that they thought that anything of the sort would be done.
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> (p. 137 - the brackets are mine).

In the present case before us, there is also no express provision in either the Co-operative Act or the Rules enabling the respondents to issue the guarantee and, if we apply the above-quoted words, it is clear that the respondents have no power to issued the impugned guarantee. Section 32 which empowers them to enter into "transaction" with non-members subject to prohibitions and restrictions prescribed by the rules is of no avail. For one thing the rules are completely silent as to the transactions referred to by the section and surely the absence of any provisions in the rules provides some indication that whatever transactions which a co-operative society can enter into these will not include the issuing of a guarantee. Such a transaction is far from being an ordinary and regular course of a co-operative society's business to be included in the general transaction under s. 32.

In the second place the object of a co-operative society is very narrow and restricted. This is spelt out clearly in s. 4 of the Act, which is as follows:

> 4. (1) Subject to the provisions hereinafter contained a society which has as its object the promotion of the economic interests of its members in accordance with co-operative principles, or a society established with the object of facilitating the operations of such a society, may be registered under this Act with limited liability.
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> (2) For the purpose of this section, "co-operative principles' includes -
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> (a) voluntary and open membership;
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> (b) democratic management;
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> (c) limited interest on capital;
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> (d) equitable division of profits;
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> (e) promotion of co-operative education; and
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> (f) active co-operation among registered societies.

It is clear from this section that a co-operative society must have as its object the promotion of economic interests of its members in accordance with co-operative principles; otherwise it cannot be registered as such. In my opinion, the so-called special power of a co-operative society to enter into transactions with non-members under s. 32 must therefore on the authority of *Colman's* case (*supra*) and *Small v. Smith* (*supra*) be construed with reference to its object's provision contained in s. 4. Thus under no circumstances could the giving of guarantee in this case, which is to a non-member for the benefit of another non-member be considered to be for the promotion of the economic interests of members of the respondents. It is difficult to see how the members would benefit from such a guarantee and how their economic interests would be promoted, let alone in accordance with co-operative principles. It is said that the Court is not in a position to make this assessment because it is not pleaded. With respect, I cannot accept this narrow view of having to tie every little bit of opinion to technicalities. Surely this is a matter on which the Court could make and assessment when interpreting the relevant statute from the fact of the issue of guarantee itself without assuming or presuming any other fact not before it.

It was pointed out however, that because a co-operative society has power to enter into contracts under s. 8, the word "transactions" in s. 32 must be given a wide meaning so as to include every kind of transaction, including the giving of a guarantee to a non-member in respect of liability of another non-member. This proposition is arrived at by a simple argument in that as every guarantee is a contract governed under Part VIII of the Contract Act and it is also a transaction the word "transaction" in s. 32 must therefore include or at least mean a guarantee. This trilogy of circuitous argument, i.e. contract, guarantee and transaction, whilst it may appear plausible, overlooks one very important cardinal principle in that whatever a statutory corporation does by way of contract, it can only do so within its object for which it is incorporated, or it cannot do so only in the words of Lord Cranworth LC in *Shrews and Birmingham Rly Co. v. N.W. Rly Company* [1857] 10 ER 1237 at 1247 "as to matters not connected with its corporate duties". No corporation can be entering into a contract do what it is not authorized to do. If it does that it will be *ultra vires*. Thus, if the subject matter of a contract which a corporation enters is beyond the scope of its incorporation or object, the contract is void *ab initio* and cannot be rendered *intra vires* by ratification, estoppel, lapse of time, acquiescence or delay. (*9 Halsbury's Laws of England,* 4th Edn., para. 1334). Nor can it enter into any contract or take any action incompatible with the due exercise of its powers and the discharge of its duties. *(Birkdale District Electric Supply Co. Ltd. v. Southport Corporation* [1926] AC 355 at 365, per Lord Birkenhead).

It is a mistake to think that the power to enter into contracts by a corporation is an independent power, unrelated to its other powers and that it is even wider than thereto. Contracting power, in my view, is no more than an enabling power by which all other powers, be they general or special, could be exercised. To give a loan, to borrow money, to hire and appoint staff, to rent office premises and to do a lot of other dealings with members and non-members, all these could only be accomplished by entering into appropriate contracts with relevant parties. Without power to enter into contracts, these other powers cannot be exercised and, therefore, remain illusory. In my view, even if the power to enter into contracts is not expressly spelt out in the statute, this power being

a necessary enabling power must be implied from the very fact of incorporation itself and also from the grant of other powers. (Section 30(1) of Interpretation and General Clauses Act, 1948).

If there is still a lingering doubt, however, as to the extent of the contracting power of a corporation, I will only refer to *Anson's Law of Contract*, 25th Edn., at p. 229, wherein the learned author said:

> The contractual capacity of a corporation incorporated by statute is limited by the fact that any act done by the corporation outside its statutory powers is, at common law, *ultra vires* and void. Since the corporation has no existence independent of the Act of Parliament which creates the corporation or authorizes its creation, it follows that its capacity is limited to the exercise of such powers as are actually conferred by, or may reasonably be deduced from, the language of the statute.

This means that whilst a person *sui juris* can enter into all kinds of contracts irrespective of the subject matter - barring only illegal contracts and public policy - a statutory corporation's power or capacity to enter into contracts is only as extensive and as restricted as its object and all its other powers are. As an illustration of this principle is *Ashbury Railway Carriage and Iron Co. v. Riche* [1875] LR 7 HL 653, 658, wherein the House of Lords held that a contract entered into by a company which was outside the Memorandum of Association was *ultra vires* and void.

Having regards to all these authorities, the conclusion is inescapable that the respondents' power to enter into contracts must similarly be limited and circumscribed by the object of their incorporation under s. 4 and is as extensive and restricted as their other powers are, be they general or special. *Colman's* case (*supra*), *Small v. Smith* (*supra*), *Ashbury v. Riche* (*supra*) *and Birkdale District Electric Supply Co. v. Southport Corpn.* (*supra*) *and Shrews and Birmingham Rly Co. v. N.W. Rly Co.* (*supra*).

In conclusion, I hold that this guarantee is *ultra vires* and void *ab initio.* I would dismiss this appeal with costs, although on entirely different reasons from those given by the learned Judge in the Court below. I would also order that the deposit be paid to the respondents on account of taxed costs.

Abdul Hamid CJ:

I have had the advantage of reading the judgment of the Lord President with which I fully agree. The crucial issue in this appeal is whether the guarantee given by the respondent on 14 October 1975, in favour of the appellant in valid.

The respondent is a co-operative society registered under the Co-operative Societies Act 1948 (Revised - 1983 as Act 287) (hereinafter called the Act). Fundamentally the functions of a society so registered must not only be consistent with its objectives but also the purposes of the Act. It seems unreasonable, in my view, to hold that it can operate outside the scope allowed by law or the rules made under the Act. I agree that ss. 30, 31 and 32 are relevant for purposes of considering the issue. If I may add, the effect of ss. 4 and 8 of the Act must also be considered. Section 30 provides for the making of loans to only those referred to in sub-section (1)(a) to (d). Section 31 deals with the receipt of deposits and loans from persons who are not members and this function is

limited to the extent and under such conditions as may be prescribed by the rules or by-laws. Section 32 allows transactions with persons other than members but is made subject to such prohibitions and restrictions as may be prescribed by the rules.

It is in respect of the transactions referred in s. 32 that Counsel for the appellant is contending that the power of the respondent to give the guarantee was fully covered by the section. It is urged upon this Court to hold that the word "transactions" used in the section is sufficiently wide to include the giving of guarantees. The reason is that there is no restriction or prohibition in the rules against the giving of such guarantee. And that being the case the guarantee is valid.

It is common ground that there is no prohibition or restriction in the rules. But the question is, can rules be made in respect of transactions referred to in s. 32? Sub-section (2) of s. 51 sets out specific matters for which rules may be made but none of these, I think, can be related to transactions of a registered society with non-members of the nature suggested by Counsel for the appellant. There is of course the power of the Minister's under sub-section (1) of s. 51. In so far as the Minister's power under sub-section (1) is concerned, my view is that he can only make such rules as may be necessary for the purpose of carrying out or giving effect to the principles and provisions of the Act. In effect it means that the Minister is vested only with the power to make rules which are within the scope of the Act. The word "transactions" is not defined. The question is can it be construed to cover any transaction whatsoever with non-members? I do not think so. My view is that the law only allows those transactions which, expressly or impliedly, come within the scope of the Act or rules made under and in accordance with s. 51 of the Act.

To decide therefore whether the word "transactions" used in the section covers such a guarantee, the exact nature of a guarantee must be determined. First, what is a "guarantee"? It is defined in the *Shorter Oxford English Dictionary*, in relation to fund, to mean "a sum of money pledged as a contingent indemnity for possible loss". The same word is defined in *Words and Phrases Legally Defined* to mean:

> an accessory contract, whereby the promisor undertakes to be answerable to the promisee for the debt, or miscarriage of another person, whose primary liability to the promisee must exist or be contemplated.

As can be seen, a guarantee is a transaction, in effect it is a contract whereby the respondent accepts a commitment making itself liable to pay a sum of money upon the happening of a certain event. In essence, it is a contingent liability. As it is basically a financial commitment involving the payment of money, immediate or otherwise, the power so to do must, in my view, be properly sanctioned by the Act. Any contention that s. 32 of the Act sanctions a transaction of this nature would conceivably be placing too wide a construction ignoring the fundamental objects of the society which is to promote the interest of its members in accordance with co-operative principles as set out in s. 4 of the Act.

Another section which I think is pertinent is s. 8 of the Act. It provides that a society may enter into contracts. This section is, in my view, a general provision which is intended to spell out the capacity of the society to enter into contracts with both members

and non-members consequent upon incorporation. The fact however remains that while it can enter into contracts the particular transactions must in any event be a transaction authorised by the Act or the rules made thereunder.

I therefore fully subscribe to the view expressed by the Lord President to the effect that the word "transactions" under s. 32 should only relate to such power as a co-operative society reasonably and properly requires for the purpose of carrying out objects of its incorporation. I would hasten to add that the word "transactions" should also relate to such power to give effect to matters covered by the rule made under s. 51 of the Act. Since it is a power given by an Act of Parliament, clearly it should not extend any further than as expressly stated in the Act or "is necessarily and properly required for carrying into effect the undertaking and works the Act has expressly sanctioned." *Colman v. Eastern Countries Rly. Co.* at p. 486 or by fair implication the Act confers authority upon the society so to do. *Small v. Smith* at p. 138.

For reasons stated, I would hold the guarantee is *ultra vires* and void *ab initio* and accordingly dismiss the appeal with costs.

Wan Suleiman SCJ (dissenting):

I need not set out the facts of this appeal which have been most succinctly set out by the Lord President. The issue in this appeal is whether the guarantee given by the respondents on 14 October 1975 to the appellants is valid.

The substance of the arguments advanced on appellants' behalf was that s. 32 read together with s. 8 of the Co-operative Societies Act empowers the respondents to give such a guarantee.

For ease of reference ss. 8 and 32 of the Act are set out hereunder:

> S.8 The registration of a society shall render it a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold movable and immovable property of every description, to enter into contracts, to institute and defend suits and other legal proceedings and to do all things necessary for the purposes of its constitution.
>
> S.32 Save as provided in ss. 30 and 31 the transaction of a registered society **with persons other than members** shall be subject to such prohibitions and restrictions as may be prescribed by the rules.

The very wording of the latter section would make it imperative that the two previous sections should also receive our scrutiny.

Section 30 specifies to whom a registered society may make loans.

The wording of s. 31 is significant and is therefore set out in full:

> S.31 A registered society shall **receive** deposits and loans from persons who are not members only to such extent and under such conditions as may be prescribed by the rules or by-laws.

It was urged upon us that the absence of any reference to by-laws in s. 32 is of particular significance. Whilst those who may receive loans are prescribed by s. 30 of the Act itself, and those who may borrow by the rules and by-laws, the transactions of the society with non-members (which it was argued meant transactions other than loans, and borrowing from non-members) are governed by the rules only.

Section 79 of the Contracts Act defines a "contract of guarantee" as "a contract to perform the promise, or discharge the liability of a third person in case of his default...". It follows from the line of reasoning adopted by Counsel for appellants that since the respondents have capacity to contract under s. 8 and the Co-operative Societies Rules 1949, a comprehensive body of rules duly made by the Minister under s. 51 of the Act contain nothing to prohibit or restrict the making of contracts of guarantee with non-members of the society, the contract in question, which is a transaction within the meaning of s. 32 of the Act in *intra vires* and therefore valid.

I shall return to a consideration of the meaning to be given to the word "transaction" in s. 32 in due course.

In the meanwhile let us examine the response made. In *PP v. Datuk Harun b. Haji Idris & Ors.* [1977] 1 MLJ 180 a 205, where Abdoolcader J (as he then was) said:

> A natural person has the capacity to do all things save such as are forbidden or prohibited by law. But this rule is reversed in the case of a corporation (which the Bank is by virtue of s. 8 of the Ordinance), and, in relation thereto, what the governing statutory provisions do not expressly or impliedly authorise or permit is to be taken to be prohibited not by virtue of any express or implied statutory prohibition but by the doctrine of *ultra vires*.

To the same effect is para. 1333 of Vol. 9 of *Halsbury's Laws of England* - 4th Edn.:

> The powers of a corporation created by statute are limited and circumscribed by the statutes which regulate it, and extend no further than is expressly stated therein, or is necessarily and properly required for carrying into effect the purposes of its incorporation, or may be fairly regarded as incidental to, or consequential upon, those things which the legislature has authorised. What the statute does not expressly or impliedly authorise is to be taken to be prohibited.

Before we proceed to consider whether the contract of guarantee comes within the express or implied terms of the statutory provisions, let us now consider what the word "transactions" in s. 32 means. Firstly, I see no reason why the plain dictionary meaning of this word should not be applied. To "transact" according to the *Shorter Oxford English Dictionary* is "to carry through negotiations, to have dealings, to do business, to treat". It is in the same sense that the word is used in *Smith v. Small* [1884] 1 AC 119, decision of the House of Lords relied upon by the respondents, of which I shall have more to say in a somewhat different context.

The word "transaction" will therefore include a contract of guarantee. It is in the present instance a dealing, a business activity between respondents and the non-member.

I have considered, and with respect, would reject the argument that because loans and borrowings are specifically dealt with in two specific sections (ss. 30 & 31), such an important matter as the power to give guarantees which is, at the very least as vital as the former two, should be specifically conferred by yet another section, the absence of which must raise grave doubts as to whether the legislature had intended to grant it, or that a general reference to "transactions" can therefore refer to only dealings of a minor character incidental to the proper functioning of the respondent society.

It may well be that unless the rules are made more restrictive, or the wide powers which s. 32 provides to societies are curtailed by legislative act abuse may from time to time occur, but until then, I cannot resist echoing the words of Tindal CJ in *Warburton v. Loveland* [1832] 2 D & CL 480 at 489:

> Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature.

Returning to *Smith v. Small* (*supra*) upon which the respondent relies, the bond or guarantee was there held to be *ultra vires* because the transaction was not authorised by the rules even by implication. As Earl Selbrone LC remarked at p. 133:

> Everything, therefore, in the special words of the rules, is silent upon this matter, and no implication can be drawn as to a power to enter into a transaction of this kind.

In the instant appeal, my view is that s. 32 of the Act is explicit authority so that authority is not applicable.

Lastly Mr. Achan for respondents urged that s. 32 should be construed in the light of other provisions of the Act, and in particular s. 4(1) thereof. That sub-section reads as follows:

> Subject to the provisions hereinafter contained a society which has as its object the promotion of the economic interests of its members in accordance with co-operative principles, or a society established with the object of facilitating the operations of such a society, may be registered under this Act with limited liability.

We have already referred to s. 30 and s. 31 as aid to construing s. 32. Are we to assume that the giving of a guarantee to non-members is not conducive to the promotion of the economic interest of members of the respondent society? This question was not raised until the continued hearing before the enlarged panel of this Court, nor is there evidence that such transaction is unconducive to the economic well-being of members.

Indeed, taking the view as I do that the legislature had in s. 32 clearly given the society a wide discretion which has not in the respect of guarantees been cut down or restricted by rules, I would with respect hold that the object of the society as contained in s. 4(1) should not be resorted to as an aid to construction of s. 32.

Another point raised in the Court below by way of written submission is that s. 14(1)(a) of the Bank Kerjasama Rakyat Malaysia Berhad (Special Provisions) Act 1978 which gives the respondents power to make loans to, and stand guarantee for any loan to any person, member or non-member, is further support of the view that s. 32 of the Co-operative Societies Act 1948 did not give respondents the power to stand guarantee.

A passage from the Privy Council decision in *In re Macmanaway and In re The House of Commons (Clergy Disqualification) Act* 1801 [1951] AC 161 at 177 is apposite:

> The conditions under which a later Act may be resorted to for the interpretation of an earlier Act are therefore strict: both must be laws on the same subject, and the part of the earlier Act which it is sought to construe must be "fairly and equally open to diverse meanings". For, indeed, it is a large assumption that the framers of successive Acts of

> Parliament, sometimes separated from each other in point of time by several human generations, have always approached their subject with a consistent mind or have expressed their purpose with a strict nicety of meaning. Resort to a later Act can rarely, if ever, be justified unless the message that it conveys is a plain one, itself, at least, free from ambiguity. Even the favourite argument as to surplusage may sometimes fall on deaf ears. "It is not a conclusive argument as to the construction of an earlier Act", said Lord Haldane L.C., giving the opinion of the Judicial Committee of the Privy Council in *In re Samuel*, "to say that unless it be construed in a particular way a later enactment would be surplusage. The later Act may have been designed, *ex abundanti cautela*, to remove possible doubts.

Likewise s. 14 is my view inserted *ex abundanti cautela.*

I would therefore allow this appeal with costs.

George Seah SCJ (dissenting):

The facts giving rise to this appeal are set out in the judgment of the Lord President and I need not repeat them here. Suffice for me to say that, in my opinion, the important question in this case, I am not certain it is not the only question, is whether the guarantee given by the respondents in favour of the appellants on 14 October 1975 was *inter vires* or *ultra vires*. In order to determine that question it is necessary to examine at what the Co-operative Societies Act 1948 (hereinafter referred to as the Act) has determined in that respect.

It is common ground that the respondents are a co-operative bank incorporated and registered under the Act. It is therefore subject to the provisions of the Act. Now, the broad and general principle governing statutory corporation or body appears to be this:

> Where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited ..."
>
> (per Lord Blackburn in *Attorney-General v. Great Eastern Ry Co.* [1879-80] 5 App Cas 473 at 481).

Dealing with statutory corporation the learned authors of *Halsbury's Laws of England* (4th Edn.) Vol. 9 para. 1333, p. 779 said:

> The powers of a corporation created by statute are limited and circumscribed by the statutes which regulate it, and extend no further than is expressly stated therein, or is necessarily and properly required for carrying into effect the purposes of its incorporation, or may be fairly required as incidental to, or consequential upon, those things which the legislature has authorised. What the statute does not expressly or impliedly authorise is to be taken to be prohibited.

The general principle has been accepted and acted upon by the Courts in England and in this country (see *Public Prosecutor v. Datuk Haji Harun* [1977] 1 MLJ 180 at 205).

At the High Court the learned Judge dismissed the claim of the appellants on the ground that the guarantee was not executed in comformity with the By-laws of the respondents. It was conceded in this appeal that the By-laws were not applicable to the case.

In my opinion, the relevant sections for the purpose of this appeal are 8 and 32. Section 8 of the Act (which deals with the general powers of the respondents) reads as follows:

> The registration of a society shall render it a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold movable and immovable property of every description, to enter into contracts, to institute and defend suits and other legal proceedings and to do all things necessary for the purposes of its constitution.

In my opinion, the first limb relates to the express general powers and the second limb the implied general powers of the statutory corporation, and s. 8 appears to be a codification of this general principle. There is apparently no dispute as to the general principle applicable but we seem to differ on the interpretation of the provision of s. 32 of the Act. Section 32 (which deals the express special power of the respondents) is in the following terms:

> Save as provided in ss. 30 and 31 the transactions of a registered society with persons other than members shall be subject to such prohibitions and restrictions as may be prescribed by the rules.

It is plain that s. 32 expressly authorizes and empowers the respondents to enter into transactions with non-members subject only to the limitations imposed by the rules contained in s. 51 of the Act. Now, it is conceded that there is no rule, express or implied, forbidding the respondents from giving a guarantee to non-member. But it was adumbrated by learned Counsel for the respondents that the word "transactions" in s. 32 ought to be given a restricted meaning and that the word does not extend to the giving of "a guarantee". With respect, I am unable to accede to this contention. "Transactions" in the context of this case, must by necessity relate to all dealings, expressly or impliedly, authorized by s. 8 of the Act. Since the respondents are expressly empowered by s. 8 to enter into contracts and since "guarantee" is form of contract under s. 79 of the Contract Act 1950 it seems to follow that "transactions" as used in s. 32 should be construed to include "a guarantee". A *fortiori*, in the case of *Small v. Smith* [1885] 10 App. Cas 119 the House of Lords appears to have ruled that the expression "transaction" included "a guarantee". I would adopt this construction and find there is no merit in this submission.

Next, it was contended by learned Counsel for the respondents that s. 32 cannot be interpreted to mean that the respondents can enter into all kinds of transactions so long as they are not prohibited or restricted by the rules. Learned Counsel insisted that s. 32 only authorizes dealings between the respondents and non-members if and only if the transactions are beneficial to the respondents. In short, learned Counsel would like the Court to imply and read into the section the following additional words:

> and subject to the further conditions that the transaction shall be of beneficial to the respondents.

The authorities on this subject are numerous and unanimous. "No case can be found to authorize any Court to alter a word so as to produce a *casus omissus*" said Lord Halsbury in *Mersey Docks v. Henderson* [1888] 13 App Cas 595 at 602. In *Crawford v. Spooner* [1846] 6 Moore PC 1 at 8 the Privy Council said:

> We cannot aid the legislature's defective phrasing of an Act, we cannot add and mend, and, by construction, make up deficiencies which are left there.

In 1951 in *Magor and St. Mellons R.D.C. v. Newport Corporation* [1952] AC 189 it was held by the House of Lords that a Court has no power to fill any gaps disclosed in an Act. To do so would be to usurp the function of the legislature. Lord Denning appeared to accept the correctness of this view in the case of *London Transport Executive v. Betts* [1959] AC 213 and 247 in these words:

> The Judges have no right to fill in gaps which they suppose to exist in an Act of Parliament, but must leave it to Parliament itself to do so: See *Magor* case. No Court is entitled to substitute its words for the words of the Act (see *Goodrich v. Paisner* [1957] AC 65 at 88).

In other words, the language of Acts of Parliament and more especially of modern Acts must neither be extended beyond its natural and proper limits, in order to supply ommisions or defects, nor strained to meet the justice of an individual case. Lord Brougham in *Gwynne v. Burnell* [1850] ER HL 1188 at 1233/1234 said:

> If we depart from the plain and obvious meaning on account of such views we in truth do not construe the Act but alter it. We add words to it, or vary the words in which its provisions are couched. We supply a defect which the legislature could easily have supplied, and are making the law, not interpreting it. This becomes peculiarly improper in dealing with a modern statute, because the extreme conciseness of the ancient statutes was the only ground for the sort of legislative interpretation frequently put upon their words by the Judges. The prolixity of modern statutes, so very remarkable of late, affords no grounds to justify such a sort of interpretation. The only safe rule to go by is to hold that, if the Legislature had intended to obviate the consequences apprehended, it would have done so: nothing confessedly being more easy than to have added words confining the condition precedent to the property of which the Commissioners had notice.

A statute may not be extended to meet a case for which provision has clearly and undoubtedly not been made. It would be wrong to strain words to meet the justice of the present case, because it might make a precedent and lead to dangerous consequences in other cases (per Hannen J in *Whiteley v. Chappell* [1868] LR 4 QB 147 at 149).

In my judgment, the words in s. 32 of the Act are clear and unambiguous. The general rule is not to import into the statue words which are not to be found there. I must therefore decline to insert into s. 32 qualifications which are not to be found there. If s. 32 were to be interpreted in the manner suggested by learned Counsel for the respondents, the consequence would be that I would impose an additional condition on the section which the legislature did not seem fit to place. I can find no justification for adopting the view put forward by the learned Counsel for the respondents having regard to the plain wordings of the section. In my opinion, the language of s. 32 does not warrant the inference that any such qualification was contemplated. It cannot be right to cut down by this construction the effect of s. 32 for the purpose of confining it to a case like the present. To use the words of Lord Selborne LC in *Great Eastern Ry case* (*supra*) at 479 it would be contrary to sound principle to imply such a condition, not expressed in s. 32, if the words, as they stand, would be sensible and operative. Moreover, to echo the words of Lord Halsbury in *Salomon* case [1897] AC 22 at 29:

> I have no right to add to the requirements of the statue, nor to take from the requirements thus enacted. The sole guide must be Act itself.

Having ruled that the words in s. 32 of the Act are clear and explicit, the Court must give effect to them whatever may be the consequences, for in that case, the words of the statue speak the intention of the legislature (see *Warburton v. Loveland* [1852] 2 D & Ch. 480 at 409). In an appeal from India Viscount Simon LC in delivering the advice of the Privy Council said:

> Again and again this Board has insisted that in construing enacted words we are not concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to the language used." (see *King-Emperor v. Bensari Lal Sarma* [1945] 72 IA 57 at 70).

It is a fallacy to attempt to argue that s. 32 appears to authorize the respondents to enter into any kinds of transactions with non-members. In fact, the second limb of s. 32 spells out clearly the limitation which the legislature deems fit to impose, and that is the only restriction placed by the Parliament on the respondents.

Applying this to the facts herein I rule that the respondents had exercised the special power expressly conferred on them by s. 32 and that they had not been forbidden by the rules to give the guarantee to the appellants. For these reasons, I hold that the guarantee given by the respondents to the appellants on 14 October 1975 was *inter vires* and therefore lawful and valid. There are two other matters I would like to comment upon. Firstly, it was adumbrated that the said guarantee did not appear to benefit the respondents. The short answer to this submission was that this issue had not been pleaded by the respondents in their defence. No oral evidence was adduced to support or rebut it at the trial. Moreover, no argument was directed towards it. It should not be allowed to have been raised at the appeal since issues are to be decided as framed in the pleadings *(Sagarmull Nathany v. John Galstaun* [1930] AIR/PC 205).

Secondly, reference is made to s. 14(1)(a) of the Bank Kerjasama Rakyat Malaysia Berhad (Special Provisions) Act 1978. Although the amendment does not apply to the facts of this case, in my opinion, having regard to s. 30 of the Act, sub-clause (a) was inserted *ex abundanti cautela.* A great many things are put into a statute *ex abundanti cautela* (per Lord Halsbury in *McLaughlin v. Westgarth* [1906] 75 LJPC 117 at 118). The 1978 Act, in my opinion, may have been designed, *ex abundanti cautela,* to remove possible doubts (per Viscount Haldane LC in *Re Samuel* [1973] AC 514 at 526).

For the above reasons, I would allow the appeal, set aside the order of the High Court and enter judgment in favour of the appellants to be taxed here and below. The deposit of RM500 to be returned to the appellants.

E. Abdoolcader SCJ:

I have had the advantage of reading in draft the judgment of the Lord President and fully concur that this appeal should be dismissed with costs for the reasons he has given. In view however of the importance of this matter in relation to corporate powers I would add a few words.

The power of a corporation to give a guarantee must be express or clearly implied but no such power appears to be provided for in the Co-operative Societies Act, 1948 ("the Act") which revised the Co-operative Societies Ordinance, 1948. I should perhaps add

that the relevant provisions of the Act for the purposes of this matter which relates to a guarantee given by the respondent on 14 October 1975 basically reproduce their equivalent in the 1948 Ordinance as amended. It would appear to me to be abundantly clear that any reliance on the provisions of s. 8 of the Act designating a co-operative society registered under the Act as a body corporate and empowering it to enter into contracts would be misplaced as the powers of corporations to make contracts vary according to the character of the corporation. A corporation created by statute for particular purposes can only make such contracts as it is expressly or by necessary implication empowered to make by the statute creating it (*Baroness Wenlock v. River Dee Company* [1887] 36 Ch D 657n, a decision of the Court of Appeal affirmed by the House of Lords (10 App Cas 354); *Attorney General v. Great Eastern Railway Company* [1880] 5 App Cas 473). Contracts purporting to be made by statutory corporations which are outside the powers conferred by statute are *ultra vires* and void. The purpose of the doctrine of *ultra vires* is said to be to protect the body corporate and its constitutents so that corporate funds will not be expended on activities of an unknown or speculative nature, and as Professor Gower illustrates, it ensures, for example, that an investor in a gold mining company does not find himself holding shares in a fried-fish shop.

I would also point out that the negation of any power to give a guarantee under the Act is amply borne out on a referential consideration of the provisions of s. 33 of the Act which provide that co-operative societies may invest or deposit their funds in the manner and subject to the terms and conditions specifically provided therein. The giving of a guarantee does not of course amount to an investment or deposit of corporate funds but I would think that it is in effect an even more drastic commitment of the funds of a co-operative society attracting a substantially higher risk for which no specific statutory provision has been made, and I cannot see how a power of this nature can be said to be encapsulated in the nebulous and amorphous genus of "transactions" mentioned in s. 32 of the Act, a generalised and faceless term which would require to be construed in context within the ambit of the Act.

One further point. Any recourse in my view to the provisions of s. 14(1)(a) of the Bank Kerjasama Rakyat Malaysia Berhad (Special Provisions) Act, 1978 which empower the respondent to stand guarantee for any loan of money to any person whether or not a member of it, in support of the appellant's contention in this matter would be wholly misconceived as the guarantee in question in the matter before us was given on 14 October 1975, and s. 3(b) of the 1978 Act categorically enacts that the provisions of that Act shall apply in relation to the respondent upon the commencement of that Act which was only passed in 1978 as a special measure to remedy the ills that plagued the respondent then and to make special provisions for its proper management and administration. Indeed the specific provisions of s. 14(1)(a) of the 1978 Act in relation to the power of the respondent to stand guarantee would clearly manifest the fact that there was no such power hitherto under ss. 8 and 32 of the Act as otherwise it would have been quite unnecessary to enact a specific enabling provision for this purpose, and this is wholly substantiated by the fact that s. 14(1) of the 1978 Act empowers the respondent to perform the several acts and functions specified therein as its authorised business **in addition** to the powers, functions, duties and responsibilities conferred or imposed on it

by the Ordinance (*scilicet*, the Co-operative Societies Ordinance, 1948 - since revised as the Act on 18 August 1983), the rules made thereunder and its by-laws. Neither the Ordinance nor the Act therefore gives any power to guarantee as contended on behalf of the appellant.

Also found at [1985] 2 CLJ 427